Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LOREN J. ZUTZ; ELDEN J. ELSETH, PETITIONERS

v.

JOHN NELSON; ARLYN STROBLE; NICK DREES; DOUGLAS KAMROWSKI; ROUGHRIDER LEGAL SUPPORT SERVICES, INC.; DANNY OMDAHL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. What extent of allegations are necessary to maintain a successful First Amendment retaliation claim to show that there was sufficient adverse action "that would chill a person of ordinary firmness from engaging in that activity," c.f. *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

II. Is *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), properly read to bar a Section 1983 action for damage to reputation?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 601 F.3d 842 (8th Cir. 2010). App 1a. The decision of the United States District Court for the District of Minnesota, granting summary judgment, January 23, 2009, App. 1a is not reported. The district court affirmed the Magistrate Judge's denial of Plaintiffs' motion to amend its pleadings on January 14, 2009. The United States Magistrate Judge denied Plaintiffs' motion to amend their Complaint on December 1, 2008. App. 22a. The Court of Appeals denied the Petition for Rehearing *en banc* and Petition for Rehearing by the Panel on May 27, 2010, App. 56a.

JURISDICTION

Plaintiffs brought this matter in the District Court for the District of Minnesota based upon a federal question, pursuant to 28 U.S.C. 1331, in that this is a civil suit arising under the Constitution and the laws of the United States, brought pursuant to 42 U.S.C. 1983. Jurisdiction was further invoked pursuant to 28 U.S.C. 1343 (a) in that this action sought to redress deprivation, under color of state law, of rights secured to the Plaintiffs by the First, Eighth, and Fourteenth Amendments to the Constitution of the United States and the laws of the United States. The

decision of the United States Court of Appeals for the Eighth Circuit, affirming the dismissal of the Complaint and the denial of the motion for leave to amend was decided on April 15, 2010. A timely Petition for Hearing *en banc* and Petition for Rehearing by the Panel was denied on May 27, 2010. This Court has jurisdiction pursuant to 28 U.S.C. 1254 (1).

RELEVANT PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution, Section. 1. (In part).

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

42 U.S.C. 1983 Civil Action for Deprivation of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ...

STATEMENT

The Petitioners brought this lawsuit under 42 U.S.C. 1983, against the Defendants, alleging that the

Defendants had acted, jointly and separately, to deprive them of their Constitutional rights in retaliation for their investigation of improprieties of the Middle Snake Tamarac Rivers Watershed District.

The Petitioners, Loren J. Zutz and Elden J. Elseth, were board members, called managers, of the Middle Snake Tamarac Rivers Watershed District located in Northwestern Minnesota. The Petitioners filed this action alleging the Defendants, including two other board members, an administrator and employee of the Watershed District, and a private investigator from North Dakota sought to defame them, impeach their credibility, and cause them financial harm because of the investigation of the Plaintiffs which was disclosing financial improprieties by the Watershed District.

Appellants sought to amend their Complaint to show specific harm caused by the defamatory and other wrongful conduct of the Defendants. This additional harm included the refusal of the Watershed District to lease property to Zutz, as it had done previously, causing substantial loss of income, a censorship of Elden Elseth, for his activities, as well as other actions. The motion to amend was denied by the Magistrate Judge on December 1, 2008. App. 22a. The district court affirmed the Magistrate Judge's Order on January 14, 2009. On January 23, 2009, the district court granted Defendants' motion to dismiss, contending there was a failure to state a federal claim upon which relief could be granted. App. 18a.

A timely appeal was made on February 19, 2009. The Eighth Circuit Court of Appeals affirmed the

decision of the district court and held that both the initial Complaint and the proposed Amended Complaint failed to state a federal cause of action. *Zutz v. Nelson*, 601 F.2d 842, 852 (8th Cir. 2010). App. 1a.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari asks this Court to help clarify the amount of harm that must be plausibly pleaded to sustain claim for asserting a First Amendment Retaliation Claim that "would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

Alternatively, this Petition asks the Court to reconsider and clarify whether the Court of Appeals and district court are correct that *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), is properly read to bar a cause of action for damage to reputation alone.

Assuming that the Court of Appeals is correct, that damage to reputation alone is not sufficient to invoke the procedural protections of the due process clause, *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), the Petitioners submit that the evidence in this case shows that loss of reputation was coupled with some other tangible element which rises to the level of a protectable property interest.

In the original Complaint, the Appellants alleged that the actions of the Defendants caused damage to reputation, mental distress, humiliation and embarrassment as a result of the wrongful conduct of

Defendants. 601 F.3d at 849. In the proposed Amended Complaint, the Petitioners added several factual allegations in an attempt to establish Constitutional deprivation including the Watershed District board's decision not to rent property to Zutz, the board's decision to censure, the board's decision to revoke the Appellants' check signing authority, and the board's refusal to appoint the Petitioners to sub-committees. 609 F.3d at 851.

The Eighth Circuit Court of Appeals has noted that, "in some cases, embarrassment, humiliation and emotional distress may be sufficient to support a Section 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). It held, however, in this case, that while the statements of the Defendants may have damaged the reputation of the Petitioners, it also held that such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. *Id.* at 849. App. 9a.

With respect to the additional allegations in the proposed Amended Complaint, the Eighth Circuit doubted whether the additional factual allegations could state Constitutional deprivations sufficient to chill a person of ordinary firmness or were sufficient to meet the "plus" portion of the "stigma plus" test. *Id.* at 851. It held, moreover, even if it assumed that the facts did allege a Constitutional deprivation, that Section 1983 demanded more than a simple claim that the Appellees engaged in wrongful conduct and that the Appellants were deprived of their Constitutional rights, holding that the Complaint did not satisfy causation, even though the Complaint held that these actions occurred as a result of Defendants' activities.

Id.

Petitioners respectfully submit that they did plausibly plead that they engaged in protected activity and that the Defendants, to retaliate for this protected activity, took adverse action against them that would chill a person of ordinary firmness from engaging in that activity. See, *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007).

In this case, the Eighth Circuit panel concluded that the Appellants have plausibly pled that they were engaged in protected activity and that the Appellees' defamatory comments were made with an intent to retaliate for the protected activity. However, the Eighth Circuit concluded that the Plaintiffs have not "plausibly pleaded the defamatory conduct would chill a person of ordinary firmness, . . ." 601 F.3d at 849. App. 9a.

The Court noted that the Plaintiffs claimed damages to their reputation, mental distress, humiliation and embarrassment as a result of the defamatory conduct. The Court noted that, "in some cases, embarrassment, humiliation and emotional distress may be sufficient to support a Section 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). The Court went on, to state, however, since "criticism of public officials lies at the very core of speech protected by the First Amendment," . . . "it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." The Court concluded that while the statements made by the

Defendants may have damaged the reputation of Zutz and Elseth, such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. The Court, therefore, affirmed the district court's dismissal of the retaliation claim. *Id.*

The Court further denied a proposed Amended Complaint to add allegations in an attempt to establish Constitutional deprivation, including allegations of actions that resulted from the Defendants' activities, the Watershed District would not rent property to Zutz, that Elseth was censured by the Watershed District Board, and that the board revoked the Appellants' check signing authority and the board's refusal to appoint either Zutz or Elseth to sub-committees of the board. Petitioners submit that the serious economic harm would, indeed, "chill a person of ordinary firmness from engaging in such First Amendment rights."

The Eighth Circuit stated it had doubts as to whether these added factual allegations state a Constitutional deprivation sufficient to chill a person of ordinary firmness or were sufficient to meet the "plus" portion of the "stigma plus" test, but, even assuming that facts do allege a Constitutional deprivation, that Section 1983 demanded more than a simple claim that Appellees engaged in wrongful conduct and that the Appellants were deprived of Constitutional rights. The Court stated that in order to pursue a cause of action under Section 1983, a plaintiff must plead facts that would tend to establish that the defendant's wrongful conduct *caused* the Constitutional deprivation. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). The panel concluded that the Complaint was "wholly devoid" of

any factual allegation linking the bad behavior of the Appellees to the alleged Constitutional deprivations.

The reason the Court concluded this is that the Appellees themselves did not have the power to personal deprive the Appellants of the asserted rights, but only the board as a whole, and thus the allegations amounted to nothing more than "mere conclusory statements." 601 F.2d at 851.

The Eighth Circuit held that a simple "chronological analysis" of the facts did not equate to causation and therefore the matter should be dismissed and that the proposed Amended Complaint would not be allowed. *Id* at 852. Petitioners submit that this chronological analysis is, indeed, a sufficient showing of causation in order to avoid a motion to dismiss. Taking all inferences in favor of the non-moving parties, the Court should have allowed the case to proceed forward. Clearly, the actions of the Defendants caused the resulting harm to occur.

The second question raised by the Plaintiffs concerns the construction and continued effect of *Paul v. Davis*, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed.2d 405 (1976), insofar as it is read to bar a cause of action for damage to reputation alone. Petitioners respectfully submit that this decision may be misconstrued, or, indeed, after the passage of time, may be reconsidered so as to allow a civil rights action under Section 1983 to pursue, even if the only damages shown to result from the deprivation of civil rights is damage to reputation. In *Paul v. Davis*, the Court considered whether defamation, standing alone and apart from any other governmental action, stated or claimed for relief under

42 U.S.C. 1983.

In *Paul v. Davis*, the Court held that to be cognizable under Section 1983, the plaintiff must allege both a deprivation of a Constitutional right and the effectuation of that deprivation under color of law. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). The dissent pointed out that the implication, however, that the existence of a *vel non* of a state remedy - for example, a cause of action for defamation - is irrelevant to the determination whether there is a cause of action under Section 1983 is wholly unfounded. "It is no answer that the State has a law which if enforced would give relief. The Federal remedy is supplementary to the State remedy, and the latter need not be first sought and refused before the Federal one is invoked." *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

In this case, of course, the Court noted that the state courts upheld that the Defendants, indeed, are immune and therefore the Plaintiffs have no claim against the Respondents for the alleged violations under state law. See, *Zutz v. Nelson*, (unpublished, Minn. App. June 23, 2009) (review granted, September 16, 2009).

One's reputation has always been held as important by this Court.

"Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S. Ct. 507, 501, 27 L. Ed.2d 515 (1971); *Wieman v. Updegraff*, 344 U.S.

183, 191, 73 S. Ct. 215, 97 L. Ed. 216 (1952).

In *Jenkins v. McKeithen*, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed.2d 404 (1969), this Court held that the public branding of an individual implicates interests cognizable as either "liberty" or "property," and that such public condemnation cannot be accomplished without procedural safeguards designed to eliminate arbitrary or capricious executive action. 395 U.S. at 424.

Consequently, it is clear that the broad history of jurisprudence in the United States, as exemplified in *Jenkins* and *Constantineau* have always held that a person's interest in his good name and reputation falls within the broad term "liberty" and clearly requires that the government afford procedural protections before infringing that name and reputation by branding a person as a criminal, or otherwise defaming that person.

The precedence of this Court clearly mandate that a person's interest in his good name and reputation is cognizable as a "liberty" interest within the meaning of the Due Process Clause. To the extent that the recent decisions of this Court, or the Eighth Circuit Court of Appeals imply this is not the case, such erosions of the doctrine are ripe for review.

CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully Submitted,

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No. 09-1462

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Loren J. Zutz; Elden J. Elseth,
Appellants,
v.
John Nelson; Arlyn Stroble; Nick Drees; Douglas Kamrowski; RoughRider Legal Support Services, Inc.; Danny Omdahl,
Appellees.

December 15, 2009, Submitted

April 15, 2010, Filed

COUNSEL: For Loren J. Zutz, Elden J. Elseth, Plaintiff - Appellants: Paul Allan Sortland, SORTLAND LAW OFFICE, Minneapolis, MN.

For John Nelson, Arlyn Stroble, Defendant - Appellees: Lindsay Grier Arthur, Jr., ARTHUR & CHAPMAN, Minneapolis, MN.

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For Douglas Kamrowski, RoughRider Legal Support Services, Inc., Defendant - Appellees: Victor Lund, Richard Patrick Mahoney, MAHONEY & DOUGHERTY, Minneapolis, MN.

Before BYE, BEAM, and COLLOTON, Circuit Judges.

OPINION

BEAM, Circuit Judge.

Loren Zutz and Elden Elseth, members of the Middle-Snake-Tamarac Rivers Watershed District Board (Board), filed this action alleging state law defamation and violations of 42 U.S.C. § 1983 against the six appellees whom we divide into three different groups: (1) co-Board members John Nelson and Arlyn Stroble; (2) an administrator and an employee of the Board Nick Drees and Danny Omdahl and (3) the investigative consulting firm RoughRider Legal Support Services, Inc. (RoughRider) and its employee Douglas Kamrowski. The complaint also sought a declaration that Zutz and Elseth had not violated Minnesota law.

Appellees filed various motions to dismiss the complaint. Thereafter, Zutz and Elseth moved for leave to amend the complaint. The magistrate judge[1] issued an order denying the motion for leave to amend and the district court[2] affirmed. Subsequently, the district court granted the appellees' various motions and dismissed the original complaint for its failure to state a federal claim upon which relief could be granted. Zutz and Elseth now bring this appeal challenging both the dismissal of their complaint and the denial of their motion to amend. Since both the initial complaint and the proposed amended complaint fail to state a federal cause of action, we affirm.

I. BACKGROUND

Because this appeal arises from the grant of a motion to dismiss, we draw the relevant facts from the complaint.

See *In re 2007 Novastar Fin. Inc., Sec. Litig.*, 579 F.3d 878, 880 (8th Cir. 2009).

A. Defamatory Conduct

Sometime after being appointed to the Board, Zutz and Elseth suspected that the Board was involved in various financial improprieties. Accordingly, they launched an independent investigation, during which they gained access to the Board's bank and payroll records. These records confirmed their suspicions.

On June 18, 2007, at a formal meeting of the Board, co-Board members Nelson and Stroble complained about the appellants' investigation. Specifically, Nelson and Stroble made statements falsely claiming that the appellants had violated Minnesota law. In an effort to find support for their false accusations, the appellees requested that the Marshall County Commission investigate the matter. County Attorney Michael Williams followed up on this request and hired RoughRider, a North Dakota investigating firm.

RoughRider's employee, Kamrowski, conducted an investigation and filed a formal report with Williams. The report contained a number of false allegations against the appellants including conclusions that appellants had engaged in improper acts. Despite the allegations in the report, Williams concluded that appellants had not committed any malfeasance.

Although Williams declined to adopt the report's conclusions, appellee Drees sent the report to a wide number of people in Marshall County, thereby falsely representing the report as the final conclusion as to the

legality of the appellants' financial investigation. Drees also sent a letter to certain people falsely alleging, among other things, that the Board had lost its insurance as a result of appellants' conduct.

Meanwhile, appellee Omdahl joined in making false and disparaging comments about the appellants by sending a letter to the editor of a newspaper in Thief River Falls, Minnesota. The letter falsely contended that appellants had engaged in various illegal and improper acts. Notably, the letter was never published. But, in an effort to obtain an audience for the false statements, Omdahl and Drees brought their letters to the attention of the Marshall County Board of Commissioners.

B. Procedural Posture

Appellants first challenged the conduct of Nelson and Stroble in Minnesota state court on a theory of defamation. That matter was resolved when the trial court dismissed the action with prejudice after finding that the defendants were entitled to immunity. Subsequently, the appellants filed the original complaint in this action against all six of the appellees alleging § 1983 violations and state law defamation claims. Specifically, the original complaint claimed deprivation of their Fourteenth Amendment rights and alluded to violations of their First Amendment rights.

Additionally, the initial complaint contained a separate claim alleging that the appellees conspired to violate the appellants' constitutional rights. The appellees filed various motions requesting that the court dismiss the complaint. In response, appellants moved for leave to

amend the complaint. In their proposed amended complaint, the appellants maintained their original allegations and added new accusations that they were denied certain rights including not being appointed to subcommittees of the Board and not being permitted to be signatories on the Board's checking account. Additionally, the proposed complaint asserted that Zutz had lost the right to rent property from the Board and that Elseth had been improperly censured by the Board.

The magistrate judge denied the motion for leave to amend, finding that the proposed amendments would be "futile." Specifically, the magistrate judge found that the allegations against Nelson and Stroble were barred by res judicata, and that the proposed amended complaint failed to allege that the appellees caused the appellants' deprivation of constitutional rights. Accordingly, the magistrate judge held that the amended complaint was devoid of any federal cause of action. The appellants objected to that order, but the district court affirmed. Subsequently, the district court dismissed the original federal complaint for failure to state a claim upon which relief could be granted.

II. DISCUSSION

A. Res Judicata

As noted earlier, appellants first filed an action in Minnesota state court against Nelson and Stroble for defamation arising out of the statements at the June Board meeting. The state court dismissed the action after it held that Nelson and Stroble had immunity. The magistrate judge concluded that both the state action

and this action against Nelson and Stroble arose out of a common nucleus of operative fact. Thus, res judicata precluded the appellants from pursuing those claims in this subsequent action.

"We review a district court's dismissal decision on grounds of res judicata de novo." *Banks v. Int'l Union Elec., Elec., Technical, Salaried and Machine Workers*, 390 F.3d 1049, 1052 (8th Cir. 2004). In examining whether a final decision in a state-court judgment precludes a subsequent federal court action, we "give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984). Under Minnesota law, res judicata

> applies as an absolute bar to a subsequent claim when (1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter.

Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). And "[r]es judicata not only applies to all claims actually litigated, but to all claims that could have been litigated in the earlier action." Id.

The appellants do not contest that the earlier claim involved Nelson and Stroble, that there was a final judgment or that they had a full and fair opportunity to litigate the matter. However, they do contend that the

state-court claim did not involve the same set of circumstances as those alleged in the current action. Specifically, they assert that the facts in the state-court action were based on the initial defamatory statements of Nelson and Stroble, while the federal action is comprised mostly of conspiratorial acts and resulting damages that occurred after the initial defamation. Under Minnesota law, "if the right to assert the second claim did not arise at the same time as the right to assert the first claim, then the claims cannot be considered the same cause of action." *Care Inst., Inc.-Roseville v. County of Ramsey*, 612 N.W.2d 443, 447 (Minn. 2000).

Contrary to appellants' view of their federal complaint, the only allegations in the pleading directly implicating Nelson or Stroble stem from their actions at the June Board meeting. Thus, it is certain that appellants anchor their case against Nelson and Stroble on the same defamatory statements that formed the basis of the state-court action. Accordingly, with regard to the alleged defamatory statements of Nelson and Stroble at the June Board meeting, this action involves the same set of facts as the earlier state-court claim. Since the appellants could have raised the same claims in their earlier state court action, their attempt to assert this action against Nelson and Stroble based on those June comments is precluded.[3]

B. Dismissal of the Original Complaint

1. Standard of Review

We review "*de novo* the grant of a motion to dismiss, taking all facts alleged in the complaint as true." *Owen*

v. Gen. Motors Corp., 533 F.3d 913, 918 (8th Cir. 2008). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). Thus, "although a complaint need not include detailed factual allegations, 'a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *C.N. v. Willmar Pub. Sch., Indep. Sch. Dist. No. 347*, 591 F.3d 624, 629-30 (8th Cir. 2010) (quoting *Twombly*, 550 U.S. at 555).

The appellants contend that the original complaint states a claim for relief under § 1983. Pursuant to our precedent, to state a claim for relief under § 1983, a plaintiff must allege sufficient facts to show "(1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." *Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009). For purposes of our discussion we assume (without deciding) that the appellants sufficiently alleged that the appellees were acting under color of state law. Thus, the remaining issue is whether the complaint adequately alleged that the appellees deprived the appellants of a constitutionally protected federal right. Appellants aver that the initial complaint asserts deprivation of their First, Fifth and Fourteenth Amendment rights. We disagree.

2. First Amendment Retaliation

To successfully plead a First Amendment retaliation claim, a plaintiff must plausibly plead that he/she "engaged in protected activity and that defendants, to retaliate for the protected activity, took adverse action against [them] that would chill a person of ordinary firmness from engaging in that activity." *Lewis v. Jacks*, 486 F.3d 1025, 1028 (8th Cir. 2007). The appellants have plausibly pled that they were engaged in protected activity and that the appellees' defamatory comments were made with an intent to retaliate for the protected activity. But, because they have not plausibly pleaded that the defamatory conduct would chill a person of ordinary firmness, the First Amendment retaliation claim was properly dismissed.

The only retaliatory harms appellants allege in the original complaint are damage to their reputation, mental distress, humiliation and embarrassment as a result of the appellees' defamatory conduct. We have noted that "[i]n some cases, embarrassment, humiliation and emotional distress may be sufficient to support a § 1983 claim." *Naucke v. City of Park Hills*, 284 F.3d 923, 928 (8th Cir. 2002). However, since "'[c]riticism of public officials lies at the very core of speech protected by the First Amendment,'" *id.* at 927 (quoting *Colson v. Grohman*, 174 F.3d 498, 507 (5th Cir. 1999)), "it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise." *Id.* at 928 (quotation omitted). All that the original complaint alleges is that the appellees made defamatory statements regarding the appellants' exercise of their official duties as public officials. While these statements may have damaged the reputation of Zutz and Elseth,

we believe that such reputational damage was insufficient to chill a person of ordinary firmness from engaging in the protected activity. We, therefore, affirm the district court's dismissal of the retaliation claim.

3. Fourteenth Amendment Due Process

The original complaint also includes a count asserting that appellees violated the appellants' Fourteenth Amendment due process[4] rights. Appellants assert that they adequately pleaded violations of both their procedural and substantive due process rights. Again, we disagree.

a. Procedural Due Process

Appellants claim that their reputations were damaged by the defamatory conduct of the appellees in violation of appellants' procedural due process rights. "Damage to reputation alone, however, is not sufficient to invoke the procedural protections of the due process clause." *Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003) (citing *Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)). Instead, "[t]he loss of reputation must be coupled with some other tangible element to rise to the level of a protectible property interest." *Id.* We refer to this as the "stigma plus" test. Id. The appellants have clearly alleged defamatory damage to their reputation, but they have not alleged any other tangible harm. Since damage to reputation is not alone sufficient to invoke procedural due process, the district court correctly dismissed the procedural due process claim.

b. Substantive Due Process

To survive summary judgment on their substantive due process argument, appellants "must [have] allege[d] actions by a government official which 'violated one or more fundamental constitutional rights' and were 'shocking to the contemporary conscience.'" *C.N.*, 591 F.3d at 634 (quoting *Flowers v. City of Minneapolis*, 478 F.3d 869, 873 (8th Cir. 2007)). Again, all that the appellants have alleged are assertions of defamatory conduct to which they attach the label of extreme conduct violating the appellants' fundamental rights. Since there is no fundamental right to one's own reputation, *Paul*, 424 U.S. at 701, and since appellants have not even vaguely pled any other harm, the district court was correct in dismissing the substantive due process count of the original complaint. See *C.N.* 591 F.3d at 634-35 (noting that the complaint's "vague allegations neither provide the Appellees with fair notice of the nature of [appellant's] claims and the grounds upon which those claims rest nor plausibly establish [appellant's] entitlement to any relief").

4. Conspiracy

The complaint also states that the appellees conspired to deprive the appellants of civil rights. To plead a § 1983 conspiracy claim a plaintiff must plead that he suffered "a deprivation of a constitutional right or privilege." *Askew v. Millerd*, 191 F.3d 953, 957 (8th Cir. 1999). As noted above, the appellants have failed to allege such a deprivation. Thus, their original complaint falls short of stating a cause of action. Accordingly, the district court properly dismissed the conspiracy count.

5. State Law and Declaratory Judgment Claims

Upon dismissing the federal claims with prejudice, the district court concluded that it would not exercise jurisdiction over either the state law or declaratory relief claims. We affirm this decision because a district court may decline to exercise supplemental jurisdiction when it "has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3), and because "the Declaratory Judgment Act . . . does not provide an independent basis for federal jurisdiction." *Victor Foods, Inc. v. Crossroads Econ. Dev.*, 977 F.2d 1224, 1227 (8th Cir. 1992) (citation omitted).

In sum, the initial complaint fails to plausibly allege the deprivation of a constitutional right, a necessary element of any § 1983 claim, and the district court was therefore correct in dismissing the federal claims with prejudice. As a result, the district court had discretion to dismiss the state law and declaratory relief counts without prejudice.

C. Denial of Leave to Amend

As also earlier noted, the appellants moved to amend their complaint in an attempt to avoid dismissal. The magistrate judge denied the motion, finding that any amendments would be futile. The district court affirmed. "We ordinarily review the denial of leave to amend a complaint for abuse of discretion, but when the district court denies leave on the basis of futility we review the underlying legal conclusions de novo." *2007 Novastar*, 579 F.3d at 884 (quotation omitted).

Denial of a motion for leave to amend on the basis of futility "means the district court has reached the legal conclusion that the amended complaint could not withstand a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure." *Cornelia I. Crowell GST Trust v. Possis Med., Inc.*, 519 F.3d 778, 782 (8th Cir. 2008). Accordingly, in reviewing a denial of leave to amend we ask whether the proposed amended complaint states a cause of action under the Twombly pleading standard outlined above.

In their proposed amended complaint, appellants added several factual allegations in an attempt to establish a constitutional deprivation. These factual allegations include the Board's decision not to rent property to Zutz, the Board's decision to censure Elseth, the Board's decision to revoke the appellants' check signing authority and the Board's refusal to appoint either Zutz or Elseth to subcommittees of the Board.

We have doubts as to whether these added factual allegations state constitutional deprivations sufficient to chill a person of ordinary firmness or are sufficient to meet the "plus" portion of the "stigma plus" test. But, even if we assume that these facts do allege a constitutional deprivation, § 1983 demands more than a simple claim that the appellees engaged in wrongful conduct and the appellants were deprived of constitutional rights. Indeed, to state a cause of action under § 1983, a plaintiff must plead facts that would tend to establish that the defendant's wrongful conducted *caused* the constitutional deprivation. See *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) ("If it appears from the complaint, . . . that there is no causal connection between the alleged deprivations and the

challenged conduct, the complaint may properly be dismissed for failure to state a claim."). Here, even if the amended complaint alleges wrongful conduct on the part of the appellees and a constitutional deprivation, the complaint is wholly devoid of any factual allegations linking the bad behavior of the appellees to the alleged constitutional deprivations.

Notably, several paragraphs of the proposed amended complaint state that the appellees were directly responsible for the constitutional deprivations. However, the appellees did not have the power to personally deprive the appellants of any of the asserted rights. Instead, only the Board as a whole, or at least a majority of the Board, could direct such harm.[5] As such, these allegations amount to nothing more than "mere conclusory statements," which do not suffice to state a plausible cause of action. *Iqbal*, 129 S. Ct. at 1949.

At oral argument, counsel for the appellants contended that the pleadings imply that the defamatory conduct caused the Board to take away the appellants' rights. As support for this "implication," counsel encouraged us to engage in a "chronological analysis" of the facts. Contrary to counsel's contention, however, chronology does not equate to causation. Simply because one event came first does not mean that the former *caused* the latter. Additionally, although we are permitted to draw inferences from the facts pleaded, see *Twombly*, 550 U.S. at 556, the only reasonable inference we can draw from the proposed amended complaint is that the defamatory conduct damaged the appellants' reputation. As we discussed above, such reputational damage is not alone sufficient to state a constitutional deprivation. *Gunderson*, 339 F.3d at 644. Moreover,

without more, it would be unreasonable for us to infer that the appellees' defamatory conduct caused the Board to strip the appellants' of constitutional rights.

Finally, counsel also contended that the "intent" of the pleadings was to allege that the appellees' conduct caused the Board to strip the appellants' constitutional rights. While counsel may have intended to state a cause of action, Twombly does not require us to divine what is in the mind of the plaintiff. Instead, we must look to the pleadings and discern whether the complaint states enough facts that plausibly leads to a cause of action. *Twombly*, 550 U.S. at 557. That is, that the defamatory action of these appellees caused a third party to act in a way that deprived the appellants of their constitutional rights. Without alleging any facts to suggest such a causal nexus, the proposed complaint only alleges separate actions by independent parties which fail to state a federal cause of action against these appellees. Accordingly, the proposed amended complaint would not survive a 12(b)(6) motion to dismiss and is, therefore, futile.

III. CONCLUSION

The original complaint fails to plausibly allege a constitutional deprivation. The proposed amended complaint, to the extent it states a constitutional deprivation, fails to plausibly allege a causal connection between the appellees' conduct and any constitutional deprivation. Accordingly, the district court's dismissal of the complaint and the denial of the motion for leave to amend are affirmed.

Footnotes

1The Honorable Raymond L. Erickson, Chief Magistrate Judge for the District of Minnesota.

2The Honorable Joan N. Ericksen, United States District Judge for the District of Minnesota.

3To the extent that the complaint alleges that Nelson and Stroble engaged in conspiratorial acts which arose after the state proceeding was decided, we assume that those claims are not precluded, and we address those allegations below.

4Appellants also contend that they have asserted a Fifth Amendment due process violation. However, since "[t]he Fifth Amendment's Due Process Clause applies only to the federal government or federal actions, and the [appellants] have not alleged that the federal government or federal action deprived them of property," their Fifth Amendment due process claim must fail. *Barnes v. City of Omaha*, 574 F.3d 1003, 1005 n.2 (8th Cir. 2009).

5Appellants rely on the doctrine of joint and several liability to argue that the law does not require that they sue all responsible parties in order to recover from one responsible party. This argument misses the point. The problem with the pleading is not that they did not sue enough of the parties who caused the damage. Instead, the problem is that the appellants have not plausibly alleged that the defamatory conduct of the appellees *caused* the deprivation of constitutional rights. Instead, the proposed amended complaint states that the appellees took wrongful action and that a third party, namely the Board, deprived the appellants of constitutional rights. These appellees cannot be liable

under § 1983 for the Board's action unless the appellants can show a causal connection between the appellees' conduct and the Board's action depriving appellants of a constitutional right. *Morton*, 793 F.2d at 187. The proposed complaint simply fails to allege any such nexus.

Filed 01/23/09
Civil No. 08-958 (JNE/RLE)
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Loren J. Zutz and Elden J. Elseth, Plaintiffs,
v.
John Nelson, Arlyn Stroble, Nick Drees, Douglas Kamrowski, RoughRider Legal Support Services, Inc., and Danny Omdahl,
Defendants.

ORDER

Paul A. Sortland, Esq., Sortland Law Office, appeared for Plaintiffs Loren J. Zutz and Elden J. Elseth.

Lindsay G. Arthur, Jr., Esq., Arthur Chapman Kettering Smetak & Pikala, PA, appeared for Defendants John Nelson and Arlyn Stroble.

Paula Duggan Vraa, Esq., Larson King, LLP, appeared for Defendants Nick Drees and Danny Omdahl.

Richard P. Mahoney, Mahoney Dougherty and Mahoney, PA, Esq., appeared for Defendants Douglas Kamrowski and RoughRider Legal Support Services, Inc.

Plaintiffs Loren J. Zutz and Elden J. Elseth are board members of the Middle Snake Tamarac Rivers Watershed District, and they bring this action against two other board members, Defendants John Nelson and Arlyn Stroble; the District's Administrator, Defendant Nick Drees; an employee of the District, Defendant

Danny Omdahl; and an investigator and investigative agency, Defendants Douglas Kamrowski and RoughRider Legal Support Services, Inc., respectively. Plaintiffs assert claims under 42 U.S.C. § 1983 (2000) for alleged violations of their constitutional rights, as well as claims under state law for defamation per se, defamation, and negligent defamation. Plaintiffs also seek a declaration that certain actions they have taken did not violate Minnesota law. The case is before the Court on various dispositive motions filed by Defendants. For the reasons below, the Court grants the motions and dismisses the case.

As best the Court is able to discern, the federal claims in Plaintiffs' Complaint are based on allegations of defamation, presumably in violation of Plaintiffs' Fourteenth Amendment rights to due process.[1] "Defamation, by itself, is a tort actionable under the laws of most States, but not a constitutional deprivation." Siegert v. Gilley, 500 U.S. 226, 233 (1991). Before damage to reputation will qualify as a liberty or property interest protected by the Fourteenth Amendment right to procedural due process, "[t]he loss of reputation must be coupled with some other tangible element," Gunderson v. Hvass, 339 F.3d 639, 644 (8th Cir. 2003), such as loss of public employment. See Siegert, 500 U.S. at 234-35; Paul v. Davis, 424 U.S. 693, 701-12 (1976); cf. Boyanowski v. Capital Area Intermediate Unit, 215 F.3d 396, 401 (3d Cir. 2000) (stating that, while defamation-related procedural due process claims are cognizable, "precedent makes clear that [a 'defamation-type'] claim cannot present a substantive due process violation in the first place"). In this case, neither the Complaint nor Plaintiffs' memoranda allege some other such "tangible element."

See Brown v. Simmons, 478 F.3d 922, 923 n.3 (8th Cir. 2007) (indicating that, in connection with alleged defamation, transferring an employee to a different position with less pay is insufficient to create a due process issue). Accordingly, the Court concludes that Plaintiffs fail to state a claim with respect to their defamation-based allegations regarding violation of their Fourteenth Amendment due process rights. See Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995) (indicating a motion to dismiss should be granted when the "allegations that show on the face of the complaint that there is some insuperable bar to relief "(quotation marks omitted)).

Regarding Plaintiffs' remaining claims, the Declaratory Judgment Act does not provide an independent basis for federal jurisdiction, see Victor Foods, Inc. v. Crossroads Economic Development, 977 F.2d 1224, 1227 (8th Cir. 1992), and a district court may decline to exercise supplemental jurisdiction over state-law claims if it "has dismissed all claims over which it has original jurisdiction," 28 U.S.C. § 1367(c)(3) (2006). Plaintiffs may pursue these claims in state court. In the absence of complete diversity, the Court dismisses these claims without prejudice.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. Defendants Nelson and Stroble's Motion to Dismiss with Prejudice [Docket No. 22] is GRANTED to the extent herein indicated.

2. Defendants Drees and Omdahl's Rule 12 Motion to Dismiss [Docket No. 34] is GRANTED to the extent

herein indicated.

3. Defendants Kawrowski and RoughRider Legal Support Services' Motion for Summary Judgment [Docket No. 39] is GRANTED to the extent herein indicated.

4. Counts I, II, and VII of Plaintiffs' Complaint [Docket No. 1] are DISMISSED WITH PREJUDICE.

5. Counts III, IV, V, and VI of Plaintiffs' Complaint [Docket No. 1] are DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 23, 2009
JOAN N. ERICKSEN
United States District Judge

Footnote

[1]To the extent that Plaintiffs assert any conspiracy claim pursuant to 42 U.S.C. § 1985 (2000), the claim is conclusory and should be dismissed. See Snelling v. Westhoff, 972 F.2d 199, 200 (8th Cir.1992). In addition, Plaintiffs' memoranda indicate an intention to assert, pursuant to section 1983, a First Amendment retaliation claim. However, Plaintiffs' motion to amend the Complaint to add, among other things, a First Amendment retaliation claim was denied on the ground that the amendments would have been futile.

Filed 12/1/2008
Civil No. 08-958 (JNE/RLE)
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Loren J. Zutz and Elden J. Elseth, Plaintiffs,
v.
John Nelson, Arlyn Stroble, Nick Drees, Douglas Kamrowski, RoughRider Legal Support Services, Inc., and Danny Omdahl,
Defendants.

ORDER

I. Introduction

This matter came before the undersigned United States Magistrate Judge pursuant to the provisions of Title 28 U.S.C. §636(b)(1)(A), upon the Motion of the Plaintiffs Loren J. Zutz ("Zutz"), and Elden J. Elseth ("Elseth"), to Amend their Complaint. A Hearing on the Motion was conducted on October 21, 2008, at which time, the Plaintiffs appeared by Paul A. Sortland, Esq.; and the Defendants John Nelson ("Nelson"), and Arlyn Stroble ("Stroble"), appeared by Kirsten Hansen, Esq.[1] For reasons which follow, we deny the Plaintiffs' Motion.

II. Factual and Procedural Background

This is an action brought under Title 42 U. S.C. § 1983. See, Complaint, Docket No. 1. According to the Complaint, Zutz, Elseth, Nelson, and Stroble, are appointed members of the Board of the Middle Snake Tamarac Rivers Watershed District (the "District Board"), id. at Pars.14-15, while the Defendant Nick

Drees ("Drew") is the District Administrator, and the Defendant Danny Omdahl ("Omdahl") is a District employee. Id. at Pars.16, 59. According to the Plaintiffs, the Defendants Douglas Kamrowski ("Kamrowski"), and RoughRider Legal Support Services, Inc. ("RoughRider"), were hired to conduct an investigation into the District Board, and specifically, into certain activities of Zutz and Elseth. Id. at Pars.34-35.

The Plaintiffs claim that their First, Eighth, and Fourteenth Amendment rights were violated, when the Defendants allegedly conspired to defame the Plaintiffs, and to deprive them of their constitutional rights. Id. at Pars. 10, 65, 69, 89. In their original Complaint, the Plaintiffs assert the following seven (7) claims against the Defendants, collectively:

Count I:	Violation of Constitutional Rights under Section 1983, in "conspiring to issue defamatory communications." Id. at Par. 65.
Count II:	Conspiracy to Violate Civil Rights, by "acting in concert to issue a campaign of defamation and intimidation[.]" Id. at Par. 69.
Count III:	Defamation Per Se, for asserting that the Plaintiffs acted in an unlawful manner. Id. at Par.72.
Count IV:	Defamation, by making false and malicious statements. Id. at Pars.77-82.

Count V: Negligent Defamation, by negligently publishing statements which the Defendants should have known were false. Id. at Par. 84.

Count VI: Declaratory Judgment, that the Plaintiffs have not acted in an unlawful manner. Id. at Par. 87.

Count VII: Violation of Fourteenth Amendment Due Process Clause, by departing from accepted professional practices, with deliberate indifference to the harm cause by their defamatory conduct. Id. at Par. 89.

The Defendants are sued in their personal and official capacities, with the exception of Kamrowski and RoughRider, who are sued only in their official capacities. Id. at Pars. 3-8

Turning to the facts which underlie the Plaintiffs' claims, the Plaintiffs allege that, as District Board members, they had concerns about the compensation of the District's employees, which prompted them to inquire into the District's financial records at Bremer Bank, where the District held a checking account. Id. at Pars. 17-18. The Plaintiffs allege that, thereafter, at a District Board meeting on June 18, 2007 (the "June Board meeting"), Nelson and Stroble falsely claimed that the Plaintiffs had violated the Minnesota Government Data Practices Act ("MGDPA"), Minnesota Statutes Sections 13.01 et seq., when they conducted their financial inquiry. Id. at Par. 24.

The Plaintiffs deny any violation of the MGDPA, and they contend that Nelson and Stroble's statements were defamatory. Id. at Pars. 29-31. The Plaintiffs attribute two (2) allegedly defamatory statements to Nelson, including "I don't think there is much question that he [Zutz and Elseth] did [break the law]," and "[l]aws are being broken by Board Members -- enough is enough!" Id. at Pars.24, 26. The Plaintiffs also attribute one (1) allegedly defamatory statement to Stroble; namely, "Why should we provide legal counsel for actions that are against the law?" Id. at Par. 28.

The Plaintiffs further allege that, after the June Board meeting, the Defendants "conspired to coerce the Marshall County Commission to investigate the matter further * * * ." Id. at Par. 34. According to the Plaintiffs, Kamrowski and his company, RoughRider, were hired by the Marshall County Board, at the request of the Marshall County Attorney, and at the "insistence" of the Defendants, to conduct an investigation into the District Board and, specifically, into Zutz and Elseth's conduct. Id. at Pars. 34-35. On November 19, 2007, Kamrowski issued a two (2) page report, which summarized the results of his investigation, and the Plaintiffs contend that Kamrowski's report "made a number of false and slanderous allegations against Plaintiffs, pursuant to the request and instigation of Defendants." Id. at Par. 36.

In particular, Kamrowski reported that Zutz had improperly received copies of employee payroll checks, and bank statements, from the Bremer Bank; that Zutz and Elseth had retained copies of the employee payroll checks; that Zutz and Elseth were harassing District

employees; and that Zutz and Elseth were improperly "bringing up issues before the Watershed District meetings," among other things. Id. at Par. 38. Kamrowski presented his report to the Marshall County Attorney but, according to the Plaintiffs, the Marshall County Attorney found no basis upon which to seek the Plaintiffs' removal from the District Board. Id. at Pars. 40-41.

Next, the Plaintiffs allege that, notwithstanding their "exoneration" by the Marshall County Attorney, Drees conspired, with the other Defendants, in an "attempt to widely disseminate the investigator's report," and to "widely disseminate[] [false] allegations that the [District's] insurance was cancelled specifically because of the litigation brought by Zutz and Elseth against Nelson and Stroble." Id. at Pars. 44, 48.[2] The Plaintiffs further allege that, in a letter dated March 6, 2008, Drees made false and disparaging remarks about them, and about the results of the State Auditor's investigation. Id. at Pars. 50-51. The Complaint does not identify the alleged recipient or recipients of this letter.

With respect to Omdahl, the Plaintiffs allege, first, that he "joined the conspiracy to defame and disparage Plaintiffs," and they further allege that, in March of 2008, Omdahl sent a letter to the editor of a local newspaper, in which he made false and disparaging statements about the Plaintiffs. Id. at Pars. 59-61. Notably, the Plaintiffs represent that Omdahl's letter was never published. Id. at Par. 62. The Plaintiffs also allege that, on April 1, 2008, Drees and Omdahl presented their allegedly defamatory letters to the Marshall County Board. Id. at Par. 63. For relief, the

Plaintiffs seek $50,000.00 in economic and non-economic damages, plus attorney's fees, as well as a Declaratory Judgment, that their financial inquiry did not violate the MGDPA, or any other law.[3] Id. at pp. 16-17.

By way of additional background, the Defendants have filed separate Motions for Judgment on the Pleadings, or for Summary Judgment, see, Docket Nos. 22, 34, 39, which were originally set for a Hearing on September 19, 2008, before the District Court, the Honorable Joan N. Ericksen presiding. In their Motions for Judgment on the Pleadings, Nelson, Stroble, Drees, and Omdahl (collectively, the "District Defendants"), contend that this Court lacks subject matter jurisdiction, because the Plaintiffs have failed to plead any actionable Federal claim, pursuant to the First, Eighth, and Fourteenth Amendments, or to any other Federal statute.[4] See, Nelson and Stroble's Memorandum in Support, Docket No. 32, at 2; Drees and Omdahl's Memorandum in Support, Docket No. 36, at 1. Rather, the District Defendants maintain that the Plaintiffs allege nothing more than defamation claims, which arise under State law. Id.; Drees and Omdahl's Memorandum in Support, supra at 1. In addition, Nelson and Stroble assert that the doctrine of res judicata bars the Plaintiffs' claims, insofar as the current claims rely upon the same facts as the Plaintiffs' State Court action. See, Nelson and Stroble's Reply Memorandum, Docket No. 57, at 2.

In their response to the District Defendants' Motions, the Plaintiffs expressed their intention to seek leave to amend their Complaint, so as to rectify the deficiencies that were identified by the Defendants.[5] See, Plaintiffs' Memorandum in Opposition, Docket No. 50, at 18. Accordingly, by Order dated September 16, 2008, the

District Court cancelled the previously scheduled Hearing on Summary Judgment, and granted the Plaintiffs ten (10) days in which to serve and file a Motion to Amend their Complaint. See, Order, Docket No. 69. The District Court further deferred its consideration of the Defendants' Motions, pending the resolution of the Plaintiffs' Motion to Amend. Id.

The Plaintiffs now bring a Motion to Amend their Complaint, in which they seek to clarify their Section 1983 claims. See, Plaintiffs' Motion to Amend, Docket No. 73; Proposed Amended Complaint, Docket No. 77. The Plaintiffs' proposed Amended Complaint does not include a separate claim for a conspiracy, pursuant to Section 1983. Instead, the Plaintiffs seek to amend their original Count I, which asserted a generic violation of Section 1983, in order to assert two (2) new Counts pursuant to Section 1983 : 1) a violation of their First Amendment right to exercise free speech and to petition the government ("Count I"); and 2) a deprivation of property, without due process, in violation of the Fifth and Fourteenth Amendments ("Count II"). See, Proposed Amended Complaint, supra at Pars. 82-85.[6] In support of their reformulated Section 1983 claims, the Plaintiffs make several new factual allegations, which we outline more fully below. Id. at Pars. 17-20, 41-43, 49, 53, 58-61, 78-81.

Nelson and Stroble oppose the Plaintiffs' Motion, and argue that the proposed amendments would be futile. See, Nelson and Stroble's Memorandum in Opposition, Docket No. 81, at 1. In particular, Nelson and Stroble contend that the Plaintiffs' new allegations are asserted against non-parties, such as the District Board in its entirety, or the Marshall County Attorney. Id. at 4.

Nelson and Stroble also contend that the proposed Amended Complaint is "legally insufficient," given that the Plaintiffs' new claims are generalized against the Defendants, collectively, and that, as a result, the Plaintiffs improperly seek to hold the Defendants "responsible for the conduct of the Watershed District as a whole," and have made it "impossible to determine what specific acts the named Defendants are alleged to have done." Id.

We address the parties' arguments in turn.

III. Discussion

A. Standard of Review.Rule 15(a), Federal Rules of Civil Procedure, provides, in pertinent part, as follows:

> [A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

In construing this Rule, the Supreme Court has observed:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reasons -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of

> amendment, etc. -- the leave should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962); see also, Thompson-El v. Jones, 876 F.2d 66, 67 (8t" Cir. 1989).

Thus, while leave should be freely given, leave should not be afforded when the proposed amendments are futile. See, DeRoche v. All American Bottling Corp., 38 F. Supp.2d 1102, 1106 (D. Minn. 1998) ("Although we begin with a presumption of liberality, an amendment to a pleading can be successfully challenged on grounds of futility if the claims created by the amendment would not withstand a Motion to Dismiss for failure to state a claim upon which relief can be granted."), citing Humnhrevs v. Roche Biomedical Laboratories, Inc., 990 F.2d 1078, 1082 (8t" Cir. 1993); Weimer v. Amen, 870 F.2d 1400, 1407 (8th' Cir. 1989); see also, United States ex rel. Gaudineer & Comito, L.L.P. v. Iowa, 269 F.3d 932, 936 (8th Cir. 2001)("The denial of leave to amend based on futility means that the court found that the amended complaint failed to state a claim"), cert. denied, 536 U. S. 925 (2002). "'Accordingly, futility must be assessed in the same manner as a 12(b)(6) motion. '" Berczyk v. Emerson Tool Co., 291 F. Supp.2d 1004,1018-19 (D. Minn. 2003), quoting Lumsden v. Ramsey County Cmty. Corr. Dept, 2002 WL 31886630 at * 1 (D. Minn., December 23, 2002).

B. Legal Analysis, The deadline for amending the pleadings in this matter was November 1, 2008. See, Docket No. 31. Accordingly, the Plaintiffs' Motion is timely, and we start from the presumption that leave should be freely given to an amendment of their Complaint. We turn, therefore, to consider the potential

futility of the Plaintiffs' effort to amend their Complaint.

1. The Doctrine of Res Judicata.

a. Standard of Review. "'Res judicata' is the term traditionally used to describe two discrete effects: 1) what we now call claim preclusion, which is a valid final adjudication of a claim precludes a second action on that claim or any part of it; and 2) issue preclusion, long called `collateral estoppel," which traditionally occurs where an issue of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim." Leonard v. Southwestern Bell Corp. Disability Income Plan, 341 F.3d 696, 701 (8th Cir. 2003), citing Thomas v. General Motors Com., 522 U.S. 222, 233 n. 5 (1998).

"It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra v. Warren City School Dist. Board of Education, 465 U. S. 75, 81 (1984), citing Allen v. McCurry, 449 U. S. 90, 96 (1980). Accordingly, we apply Minnesota principles of res judicata to determine the preclusive effect of the State Court ruling on the Plaintiffs' proposed claims.

Under Minnesota law, "[res judicata precludes parties from raising subsequent claims in a second action when: `(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privities; (3) there was a final judgment on the merits; (4) the estopped party had a full and fair

opportunity to litigate the matter. "' Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P, 732 N.W.2d 209, 220 (Minn. 2007), quoting Hauschildt v. Beckingham, 686 N.W.2d 829, 840 (Minn. 2004). "Res judicata prohibits parties from raising a claim in a second suit that was, or `could have been,' litigated in the earlier action." Drewitz v. Motorwerks, Inc., 728 N.W.2d 231, 239 (Minn. 2007), citing Hauschildt v. Beckingham, supra at 840; see also, Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P, supra at 220 ("Res judicata applies equally to claims actually litigated and to claims that could have been litigated in the earlier action."), citing State v. Joseph, 636 N.W.2d 322, 327 (Minn. 2001).
In effect, res judicata "is essentially a finality doctrine which dictates that there be an end to litigation." Dorso Trailer v. American Body & Trailer, 482 N.W.2d 771, 773-74 (Minn. 1992), citing Federated Mutual Ins. Co. v. Litchfield Prec. Comb., Inc., 456 N.W.2d 434, 438 (Minn. 1990). Accordingly, it is "well established in Minnesota that a party `should not be twice vexed for the same cause, and that it is for the public good that there be an end to litigation."' Hauser v. Mealey, 263 N.W.2d 803, 807 (Minn. 1978), quoting Shims v. Sederstrom, 233 N.W.2d 292, 294 (Minn. 1975).

In determining the scope of preclusion, that a prior State Court Judgment will exact, we necessarily look to the governing law of Minnesota. See, Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373, 375 (1985)(a Federal Court must first consider the law of the State in which a Judgment was rendered when determining the preclusive effect to be accorded that Judgment), reh'g denied, 471 U.S. 1062 (1985). Under Minnesota law, which is applicable here, "'[a]judgment on the merits constitutes an absolute bar

to a second suit for the same cause of action, and is conclusive between parties and their privies * * *. '" U. S. West Financial Services, Inc. v. Buhler, Inc., 150 F.3d 929, 932 (8th Cir. 1998), quoting Dorso Trailer Sales, Inc. v. American Body & Trailer, supra at 774, quoting, in turn, Mattsen v. Packman, 358 N.W.2d 48, 49 (Minn. 1984).

Lastly, "[a] dismissal with prejudice, even if based on nonsubstantive grounds, is an adjudication on the merits and can form a basis for res judicata." Nielsen v. Eller Media Co., 2008 WL 1747893 at *3 (Minn. App., April 15, 2008), citing Johnson v. Hunter, 447 N.W.2d 871, 873 (Minn. 1989). Moreover, "a judgment becomes final when it is entered in the district court regardless of a pending appeal," because, under Minnesota law, "an appeal does not affect the preclusive nature of a judgment." Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P., supra at 220, citing Wegge v. Wegge, 89 N.W.2d 891, 892 (Mine. 1958), Wilcox Trux, Inc. v. Rosenberger, 209 N.W. 308, 310 (Minn. 1926), Schoonmaker v. St. Paul Title & Trust Co., 188 N.W. 223, 224 (Minn. 1922), and State v. Spratt, 184 N.W. 31, 32 (Minn. 1921).

b. Legal Analysis As noted, see, Footnote 2, supra, on August 17, 2007, Zutz and Elseth filed a State Court action against Nelson and Stroble for defamation per se, slander, negligent defamation, and for a Declaratory Judgment, based upon the statements of Nelson and Stroble at the June Board meeting. See, First Affidavit of Kirsten J. Hansen ("First Hansen Aff."), Docket No. 33, Exhibit A ("State Court Complaint").[7] On March 7, 2008, Nelson and Stroble filed a Motion for Judgment on the Pleadings, in which they sought dismissal of the

Plaintiffs' Complaint in State Court, and that Motion was heard, by the State Court, on May 6, 2008. See, First Hansen Aff., supra at Par. 3. In the interim, on April 4, 2008, the Plaintiffs commenced this Federal action. See, Complaint, supra.

Thereafter, on July 31, 2008, the State Court granted the Motion of Nelson and Stroble, and dismissed the Plaintiffs' claims with prejudice.[8] See, Second Affidavit of Kirsten J. Hansen ("Second Hansen Aff."), Docket No. 60, Exhibit 1 ("State Court Order"). In its Order, the State Court held that Nelson and Stroble "hold an absolute privilege for statements made as appointed board members of a political subdivision of the State of Minnesota, speaking on pertinent matters of the Watershed District." Id. at p. 8. The Court explained that the privilege applies "even for intentionally false and malicious statements." Id. at p. 7, citing Buchanan v. Minnesota Dept of Health, 573 N.W.2d 733 (Minn.App. 1998), rev. denied (Minn., April 30, 1998), citing, in turn, LeBaron v. Minnesota Board of Public Defense, 67 N.W.2d 413, 416 (Mine. 1954). The State Court noted that the allegedly defamatory statements were made during the June Board meeting, "regarding recent actions by specific board members," and it further noted that Nelson and Stroble "have a resolute interest in confirming that no illegal activities occur within the [District]." Id. at p. 8. Accordingly, the Court dismissed the Plaintiffs' claims in their entirety, on the merits, and with prejudice. Id. at p. 9.

Plainly, the State Court action involved the same factual circumstances as the Plaintiffs now seek to raise, by way of their Complaint and proposed Amended Complaint, in Federal Court -- at least with

respect to their claims against Nelson and Stroble. The pertinent parties, in both the State Court action, and this Federal case, are identical. Moreover, the State Court action resulted in a final Judgment, and it cannot be said that the Plaintiffs did not have a full and fair opportunity to litigate the State action, nor have they shown any objectively legitimate basis upon which to make any such claim.

Of course, we are mindful that, in the earlier State Court action, the Plaintiffs did not expressly include Federal claims under Section 1983, or under the Fourteenth Amendment. Such a difference in the legal theories of recovery, however, does not vitiate the preclusive effect of the prior State Court Judgment. As the Court explained, in Hauschildt v. Beckingham, supra at 840-41:

> Therefore, the focus of res judicata is whether the second claim "arise[s] out of the same set of factual circumstances." Hauser [v. Mealey, 263 N.W.2d 803,] 807 [(Minn. 1978)]; see also Meagher ex rel. Pension Plan v. Bd. of Trustees of Pension Plan, 921 F. Supp. 161, 167 (S.D.N.Y. 1995)(stating "the facts surrounding the occurrence which constitutes the cause of action -- not the legal theory upon which [plaintiff) chose to frame his complaint -- must be identical in both actions to trigger res judicata."), aff'd, 79 F.3d 256 (2nd Cir. 1996)).
>
> The "common test for determining whether a former judgment is a bar to a subsequent action is to inquire whether the same evidence will sustain both actions." McMenomy v. Ryden, 276

> Minn. 55, 58, 148 N.W.2d 804, 807 (1967). In addition, claims cannot be considered the same cause of action if "the right to assert the second claim did not arise at the same time as the right to assert the first claim." [Care Inst., Inc.-Roseville v. County of Ramsey, 612 N.W.2d 443,] 447 [(Minn. 2000)].

[Emphasis in original].

As we have explained, the factual circumstances of both the State Court action, and of the Plaintiffs' current claims against Nelson and Stroble, are identical. There is no reason why the Plaintiffs could not have raised any constitutional issues in the State Court proceeding, which arise out of Nelson and Stroble's allegedly defamatory conduct at the June Board meeting, and that they might now seek to assert here.

Accordingly, the Plaintiffs' proposed claims against Nelson and Stroble, insofar as they relate to the June Board meeting, are barred by res judicata, and therefore, are futile.[9] The barred claims include the Plaintiffs' proposed First Amendment claim, to the extent that they allege that Nelson and Stroble defamed them, in retaliation for their exercise of free speech, by publicly criticizing and investigating the District, and in retaliation for their exercise of their right to petition, by filing or participating in litigation against the District. Nonetheless, we turn to consider whether the Plaintiffs' remaining allegations are sufficient to support their newly-proposed claims.

2. The Plaintiffs' General Allegations. First, we consider the contention of Nelson and Stroble that the

Plaintiffs cannot assert new claims against the named Defendants, based upon actions taken by non-parties, including the District, its Board, and the Marshall County Attorney.

In their proposed Amended Complaint, the Plaintiffs allege that they have been the victims of retaliation, after exercising their constitutionally protected rights, and they have added several factual allegations in support of that contention. The Plaintiffs allege that, prior to his appointment to the District Board, Zutz sued the District "for alleged inadequate payments for property taken from him by the [District]." See, Proposed Amended Complaint, supra at Par. 17. The Plaintiffs also allege that Elseth spoke out against a District project, including his expression of concerns about the project to the Army Corps of Engineers. Id. at Pars.18-19. The Plaintiffs further allege that they "attempted to speak out about these issues," both before and after their appointment to the District Board. Id. at Par. 20.

The Plaintiffs also allege that their "free speech and the right to petition government for these purposes, has been stifled * * * [and] severely limited," id. at Par. 20, because the Defendants, collectively, are "punish[ing]" and "retaliat[ing]" against the Plaintiffs, for their refusal to resign their positions, for their statements and concerns about employee compensation and public compensation, and for Zutz's participation in litigation against the District, prior to his appointment. Id. at Par. 38.

With respect to the alleged retaliatory conduct, the Plaintiffs allege that the Defendants, collectively, have

barred them from serving on District subcommittees, and that they are no longer authorized to sign checks on behalf of the Board. Id. at Pars.78-79. The Plaintiffs further allege that the Defendants refused to renew Zutz's lease of farming land. Id. at Pars.38-39. Lastly, the Plaintiffs allege that "[t]he Kamrowski investigation was done in an attempt to stifle our speech activities," notwithstanding their representation that the Marshall County Board authorized the investigation, at the request of the Marshall County Attorney. Id. at Par. 53. In response, Nelson and Stroble urge that the Plaintiffs are improperly attempting to hold the individual Defendants responsible for the conduct of non-parties, including the District, or its Board as a whole. See, Nelson and Stroble's Memorandum in Opposition, supra at 4.

In order to sustain a claim under Section 1983, a plaintiff must demonstrate that the named defendants were directly and personally involved in the illegal actions, or in the policy decision which created the unlawful context for those actions. See, e.g., Beck v. LaFleur, 257 F.3d 764, 766 (8t" Cir. 2001); McNair v. Norris, 2000 WL 490709 at * 1 (8th Cir., Apri127, 2000); Martin v. Sergeant, 780 F.2d 1334, 1337 (8th Cir. 1985). Moreover, Complaints must be prepared "in a fashion that will identify the constitutional claims as against only culpable defendants." Liggins v. Morris, 749 F. Supp. 967, 971 (D. Minn. 1990). As we advised at the Hearing, since at least 1990, this District has not permitted a "shotgun approach" to pleading Section 1983 claims, where "all possible constitutional violations and all common law claims are asserted on behalf of all plaintiffs against all named defendants," and "[i]t is then left to the court to divine what discrete

constitutional violations are in fact legitimate and proper as to each plaintiff and as against each defendant." Id. at 970-971.

Here, the Plaintiffs do even less, given that have asserted wrongful conduct which can only be attributed to the District, or to its Board as a whole, notwithstanding the Plaintiffs' strained attempts to attribute those acts to the named Defendants, whether individually or collectively. See, Wells v. Schnick, 2008 WL 4110697 at *7 (D. Minn., August 27, 2008)(granting Motion to Dismiss, "[g]iven the absence of any allegation that Utech was personally, and directly, involved in any constitutional wrong that the Plaintiff seeks to vindicate"). Indeed, at the Hearing, the parties represented that the District Board consists of at least seven (7) members, which leads us to the inescapable conclusion that Nelson and Stroble could not be solely responsible for the Board's actions, as they do not constitute a majority of the Board's members. As we advised at the Hearing, we cannot comprehend how the Plaintiffs could recover against the named Defendants, for any wrongful actions taken by the Board as a whole.

In an analogous case, a District Court considered a First Amendment retaliation claim, in which a City employee claimed that he had been terminated for exercising his right to free speech. See, Criswell v. City of O'Fallon, 2007 WL 1760744 (E.D. Mo., June 15, 2007). There, the Court noted that the City was the actual employer, and therefore, was responsible for the decision to terminate the plaintiff's employment. Id. at *4. Accordingly, the Court dismissed the plaintiff's claims against the City council members and mayor because, "[i]f the City Councilmen and Mayor lacked

the authority to terminate Plaintiff, those Defendants cannot be liable for the [retaliatory] conduct complained of, namely Plaintiff's termination." Id. The Court further observed that, "[e]ven if Plaintiff's complaint can be read to allege knowledge of Plaintiff's protected speech, there are no allegations that the City Councilmen or the Mayor were involved in the employment decisions, and therefore cannot be liable under 42 U.S.C. § 1983." Id.

Here, the Plaintiffs have not specifically alleged that any of the named Defendants, whether singly or in combination, can bar them from subcommittees, revoke their authority to sign checks, refuse to renew a lease, or demand that the Marshall County Attorney conduct an investigation. In addition, given that the Plaintiffs have sued only two (2) of seven (7) Board members, we find no basis to believe that Nelson and Stroble could have taken the allegedly retaliatory acts, without at least partial agreement by some of the remaining Board members, who are not named as Defendants. As a result, we find that the Plaintiffs have not alleged any direct and personal involvement by the Defendants, whether to bar them from the District Board's subcommittees, to revoke their check-writing authority, or to refuse to renew Zutz's lease, such as would support a Section 1983 claim. Accordingly, we find that the Plaintiffs' proposed amendment is futile, insofar as the Plaintiffs seek to add allegations concerning retaliatory conduct by the District, or its Board.

Indeed, the Plaintiffs do not allege a single retaliatory act by any of the named Defendants.[10] In their proposed Amended Complaint, the Plaintiffs allege that the

District has accused Zutz of encroaching on District property, while ignoring "other actual encroachments," Proposed Amended Complaint, supra at Par. 80, and that the District publicly censured Elseth for his statements to the Army Corps of Engineers. Id. at Par. 60. The Plaintiffs further allege that the Marshall County Attorney misrepresented the nature of Kamrowski's investigation to the Marshall County Board.[11] Id. at Par. 41.

Accordingly, the Plaintiffs have failed to allege that the named Defendants were personally involved in any alleged, retaliatory conduct, and they have further failed to allege that the named Defendants could be held responsible for any such conduct. Therefore, we deny their Motion to Amend, as futile, insofar as the Plaintiffs seek to add allegations against non-parties.

3. The Proposed First Amendment Claims.

a. The Free Speech Claim. In Naucke v. City of Park Hills, 284 F.3d 923, 927-28 (8th Cir. 2002), our Court of Appeals explained the standard to be applied to the Plaintiffs' free speech claim, as follows:

> "[C]riticism of public officials lies at the very core of speech protected by the First Amendment." Colson v. Grohman, 174 F.3d 498, 507 (5th Cir. 1999)(citing New York Times Co. v. Sullivan, 376 U.S. 254, 269-70, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). Retaliation by a government actor in response to such an exercise of First Amendment rights forms a basis for § 1983 liability. Pendleton v. St. Louis County, 178 F.3d 1007, 1011 (8th Cir. 1999). To

> establish a claim for retaliation under § 1983, a plaintiff must show "she was engaged in constitutionally protected activity, that [the government official's] adverse action caused her to suffer an injury which would 'chill a person of ordinary firmness from continuing * * * in that activity,' and that the adverse action was motivated in part by exercise of her constitutional rights." Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001)(quoting Bloch v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998))[, cent. denied, 536 U.S. 907 (2002)].

Consequently, in order to state a First Amendment retaliation claim, pursuant to Section 1983, the Plaintiffs need only allege: 1) that they were engaged in constitutionally protected activity; 2) that government officials took adverse action that would chill a person of ordinary firmness from engaging in the activity; and 3) that the adverse action was motivated, in part, by the Plaintiffs' exercise of their constitutional rights. See, Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004), cent. denied, 546 U.S. 860 (2005), citing Naucke v. City of Park Hills, supra at 927-928; Hodak v. City of St. Peters, 2006 WL 3004052 at *3 (E.D. Mo., October 20, 2006).

"In non-employment contexts, a person suffers an adverse action if a reasonable person of ordinary firmness would be deterred from continuing to exercise his right to free speech." Hodak v. City of St. Peters, supra at *7, citing Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Cir. 2003). "The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time

of the courts as real and substantial violations of the First Amendment." Garcia v. City of Trenton, Missouri, supra at 728, citing Bart v. Telford, 677 F.2d 622 (7th Cir. 1982). "The test is an objective one, not subjective," and "[t]he question is not whether the plaintiff herself was deterred, though how the plaintiff acted might be evidence of what a reasonable person would have done." Id. at 729.

Here, the Plaintiffs have clearly alleged that they were engaged in constitutionally protected activity, when they complained about the District's conduct as both private citizens, and as Board members. See, Osborne v. Grussing, 477 F.3d 1002, 1005 (8th Cir. 2007)("[I]t is clear that [the plaintiffs] engaged in First Amendment-protected activity when they publicly criticized the County's enforcement practices[.]"); see also, Naucke v. City of Park Hills, supra at 927. Moreover, the Plaintiffs have alleged retaliatory actions that -- if taken by the named Defendants -- would be "sufficiently egregious to 'chill a person of ordinary firmness from continuing * * * in that [constitutionally protected] activity. '" Naucke v. City of Park Hills, supra at 928, quoting Bloch v. Ribar, supra at 678.

As noted, the Plaintiffs allege that the Defendants attempted to stifle their speech, in part, by investigating the Plaintiffs' allegedly unlawful acts. This allegation alone is insufficient to support a First Amendment claim. In Naucke, our Court of Appeals held that similar allegations of retaliatory conduct were not sufficient to sustain a First Amendment retaliation claim, namely "(1) conducting a public audit of the fire department's ladies' auxiliary while she was President, (2) publicly scolding her at City Council meetings, (3)

engaging in public name calling, (4) posting a picture of her home in a public place with the caption `The Naucke House. Donations Needed.', and (5) circulating a letter suggesting Link was the father of one of her children." Id. at 927; compare Colson v. Grohman, 174 F.3d 498, 512 (5th Cir. 1999)("Colson has alleged only that she was the victim of criticism, an investigation (or an attempt to start one), and false accusations: all harms that, while they may chill speech, are not actionable under our First Amendment retaliation jurisprudence."). As noted by the Naucke Court, "'it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise. '" Naucke v. City of Park Hills, supra at 928, quoting Bloch v. Ribar, supra at 679, quoting in turn Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982).

Nonetheless, the Plaintiffs also allege that they were subjected to retaliation when the District, and its Board, refused to lease land to Zutz, barred the Plaintiffs from Board subcommittees, and revoked the Plaintiffs' authority to sign checks on behalf of the District. Such allegations could be sufficient to state a retaliation claim under the First Amendment. Compare, Garcia v. City of Trenton, supra at 729 (fording that the receipt of four (4) parking tickets in less than two (2) months, for a total of $35.00 in fines, was sufficient to support a retaliation claim, because "[h]ere, in contrast to Naucke, defendant's conduct went beyond mere speech * * * ."); Allen v. City of Kirkwood, 2005 WL 2033429 at *4 (E.D. Mo., August 18, 2005)(denying a Motion to Dismiss, because "a five-month barrage of thirty-four municipal citations in

response to Allen's public criticism would be sufficient to `chill a person of ordinary firmness' from freely speaking out at city meetings in the future"); cf., Colson v. Grohman, supra at 513 (observing that the misuse of a recall statute could support a First Amendment retaliation claim, but not where the plaintiff "was never subjected to a recall election").

However, since the Plaintiffs do not allege that the named Defendants were personally responsible for that retaliatory conduct -- for reasons we have previously detailed -- we conclude that the Plaintiffs' proposed Amended Complaint does not state a First Amendment retaliation claim. Accordingly, we deny the Motion to Amend, insofar as it relates to the First Amendment claim.

b. The Right to Petition Claim. The Plaintiffs similarly assert that the Defendants retaliated against them for exercising their First Amendment right to petition the Government. See, Proposed Amended Complaint, supra at Pars. 83-85. As previously noted, the Plaintiffs have alleged that Zutz had been involved in litigation against the District, and in this Circuit, the Plaintiffs' right of access to the Courts is viewed as a component of the First Amendment right to petition the government for redress of grievances. See, Harrison v. Springdale Water & Sewer Commission, 780 F.2d 1422, 1426 (8th Cir. 1986); see also, Valot v. Southeast Local Sch. Dist. Bd. of Edu., 107 F.3d 1220, 1226 (6th Cir. 1997)("In our judgment, Plaintiffs' claim is best viewed as a claim under the Petition Clause, for that provision expressly protects conduct most like the conduct for which Plaintiffs seek protection from retaliation."). As our Court of Appeals has explained:

> An individual's constitutional right of access to the courts "cannot be impaired, either directly * * * or indirectly, by threatening or harassing an [individual] in retaliation for filing lawsuits. It is not necessary that the [individual] succumb entirely or even partially to the threat as long as the threat or retaliatory act was intended to limit the [individual's] right of access." Sanders [v. St. Louis County] , 724 F.2d [665, 666 (8th Cir. 1983)]. The cases from this Circuit, as well as from others, make clear that state officials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future. See, e.g., id.; Garland [v. Polley], 594 F.2d [1220, 1223 (8th Cir. 1979)]; Hall v. Sutton, 755 F.2d 786, 787 (11th Cir. 1985); Matzker v. Herr, 748 F.2d 1142, 1150-51 (7th Cir. 1984)("An act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper."); Lamar v. Steel, 693 F.2d 559, 562 (5th Cir. 1982), cert. denied, 464 U.S. 821, 104 S.Ct. 86, 78 L.Ed.2d 95 (1983); Milhouse v. Carlson, 652 F.2d 371, 374 (3d Cir. 1981); Silver v. Cormier, 529 F.2d 161, 163 (10th Cir. 1976). An individual is entitled to "free and unhampered access to the courts." United States ex rel. Cleettv. Pate, 229 F. Supp. 818, 821-22 (N.D. Ill. 1964). Harrison v. Snringdale Water & Sewer Commission, supra at 1427-28.

By way of an example, in Harrison, the Court

determined that the plaintiffs' Complaint stated a cognizable cause of action, based on a denial of access to the Courts, where the Complaint alleged that, in a suit by the plaintiffs against State actors, the State actors admitted to prosecuting a factually unsupported Counterclaim against the plaintiffs solely as a tactical means to pressure them into settling their case. Id. at 1428. Thus, while the plaintiffs' ability to file a lawsuit was not directly constrained, the Court found, nonetheless, that the defendants applied sufficient indirect pressure to restrict the plaintiffs' access to the Courts.

Here, the Plaintiffs' general allegations of retaliation relate to both their "speech activities," as we have detailed, and to Zutz's previous litigation against the District, as both a private citizen and as a public official. See, Proposed Amended Complaint, supra at Pars. 20, 38. Accordingly, the Plaintiffs have alleged retaliatory conduct which could support a claim, pursuant to their First Amendment right to petition. See, Stepnes v. Tennessen, 2006 WL 2375645 at *9 (D. Minn., August 16, 2006), aff'd, 267 Fed.Appx. 481 (8t" Cir. 2008)(reciting the elements for a retaliation claim, pursuant to the Petition Clause, which are identical to the elements for a retaliation based upon the exercise of free speech), citing Revels v. Vincenz, supra at 876.

However, because the Plaintiffs have not alleged that the named Defendants were personally responsible for the alleged retaliatory conduct, we conclude that their proposed claim is futile, for the reasons we expressed with respect to their free speech claim. Accordingly, we deny the Plaintiffs' Motion to Amend, with respect to this claim, as futile.

4. The Proposed Fifth and Fourteenth Amendment Claim. Contrary to the assertion of Nelson and Stroble, the Plaintiffs do not appear to assert a claimed deprivation of real property without due process.See, Nelson and Stroble's Memorandum in Opposition, supra at 3. ("[A]pparently based on the Watershed District's refusal to lease property, Plaintiffs claim that they have been deprived of property under the Fifth and Fourteenth Amendments."). It is true that the Plaintiffs allege that the District refused to renew a lease to Zutz, thereby costing him $92,000.00 in farming income. See, ProposedAmended Complaint, supra at Pars. 38-39. In addition, the Plaintiffs contend that the District "refused to remove all asbestos laden pipe that was left unused on [Elseth's] property," and "failed to provide compensation for said removal or trespass by the water system." Id. at Par. 19.

However, the proposed Amended Complaint does not include a Count which relates to Zutz's lease, or Elseth's water connection. Instead, Count II of the proposed Amended Complaint plainly alleges that the Defendants "conspir[ed] to issue defamatory communications, in a direct effort to harm the reputation, livelihood and relations of Plaintiffs," and that such "retaliatory conduct constitutes a deprivation of property without due process, in violation of the Fifth and Fourteenth Amendments[.]" Proposed Amended Complaint, supra at Pars. 87-89. Accordingly, it appears that the Plaintiffs seek to add a procedural due process claim, under the Fifth and Fourteenth Amendments, for the alleged damage to their reputations.[12]

Procedural due process requires that the Government

provide fair procedures to afford its citizens an opportunity to prevent a loss of life, liberty, or property. See, Birkenholtz v. Slums, 857 F.2d 1214, 1216 (8th Cir. 1988), citing Hurtado v. California, 110 U.S. 516, 531 (1884). "'In a procedural due process claim, it is not the deprivation of property or liberty which is unconstitutional; it is the deprivation of property or liberty without due process of law -- without adequate procedures. '" Id., quoting Daniels v. Williams, 474 U.S. 327, 339 (1986)(Stevens, J., concurring) [emphasis in original].

"In Board of Regents v. Roth, [408 U.S. 564, 573 (1972)], the Supreme Court held that a government employee has a liberty interest in his or her good name and reputation, which is entitled to protection when he or she is fired based on allegations of dishonesty, immorality, or illegality." Hammer v. City of Osage Beach, 318 F.3d 832, 839 (8th Cir. 2003). Accordingly, "[t]he Eighth Circuit has held that an employee's liberty interests are implicated 'where the employer levels accusations at the employee that are so damaging as to make it difficult or impossible for the employee to escape the stigma of those charges. '" Rush v. Perryman, 2007 WL 2091745 at *5 (E.D. Ark., July 17, 2007), quoting Putnam v. Keller, 332 F.3d 541, 546 (8th Cir. 2003). "A deprivation of a constitutional magnitude may occur if such an employee is not granted the opportunity to clear his or her name." Id., quoting Coleman v. Reed, 147 F.3d 751, 755 (8th Cir. 1998). Therefore, "[i]n order to establish a procedural due process claim for the loss of this protected liberty interest, [the plaintiff) must show (1) he was stigmatized by the allegations which resulted in his discharge; (2) Defendants made the allegations public; and (3) he denied the allegations." Id., citing Coleman v.

Reed, supra at 755.

Here, the Plaintiffs allege, throughout their proposed Amended Complaint, that the Defendants have engaged in defamatory conduct, by accusing the Plaintiffs of unlawful acts, and they further allege that the Defendants have widely disseminated their false and defamatory statements to the public. See, Proposed Amended Complaint, supra at Pars. 43, 45, 47-49, 54-55, 64-67, 74, 77; compare, Stodghill v. Wellston School Dist., 512 F.3d 472, 476 (8th Cir. 2008)("In reviewing whether allegedly defamatory statements are sufficient to warrant a right to a name clearing hearing, `[t]he requisite stigma has generally been found when an employer has accused an employee of dishonesty, immorality, criminality, racism, and the like. "')[emphasis added], quoting Buchholz v. Aldaya, 210 F.3d 862, 866 (8th Cir. 2000). The Plaintiffs maintain that, as a result, they have suffered serious harm to their reputations, and they generically allege that this harm has affected their property, their standing in the community, and their economic activity, id. at Par. 81, and placed their appointed positions on the District Board "in jeopardy." Id. at Pars. 37, 69.

However, the case law, which supports this type of procedural due process claim, applies in circumstances where a public employee is discharged from his position, which is not the circumstance here. See, e.g., Neal v. Fields, 429 F.3d 1165, 1167-1168 (8th Cir. 2005); Graning v. Sherburne County, 172 F.3d 611, 616 (8th Cir. 1999); Schleck v. Ramsey County, 939 F.2d 638, 642-643 (8th Cir. 1991); Rivkin v. Hennepin County, 2002 WL 31777800 at *3 (D. Minn., December 12, 2002)("The claimed damage to the plaintiff's reputation,

however, must occur during the course of the plaintiffs termination.")[citations omitted].

In contrast, a plaintiff's mere "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, * * * [a]nd any harm or injury to that interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any `liberty' or `property' recognized by state or federal law." Paul v. Davis, 424 U.S. 693, 712 (1976); Brown v. Simmons, 478 F.3d 922, 924 (8th Cir. 2007)("Injury to a person's reputation alone is not sufficient to trigger the procedural protections of the due process clause."); Hughes v. Whitmer, 714 F.2d 1407, 1417 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984)("[W]ithout a change of legal status, a stigmatized public employee's cause of action is simply one for defamation under state law and is for the state courts to entertain.")[footnote omitted], citing Meachum v. Fano, 427 U.S. 215, 226, 228-29 (1976).

Here, assuming that a Roth claim can be asserted by an appointed official, and not just by a public employee, the Plaintiffs' proposed claim still fails, since the Plaintiffs have not been terminated from their positions on the District Board. See, Brown v. Simmons, supra at 923 ("Brown's complaint failed to allege any alteration or extinguishment of a right or legal status," notwithstanding the plaintiff's claim that he had been subjected to an internal transfer.); Neal v. Fields, supra at 1167-1168 (affirming dismissal of a procedural due process claim, based upon the nurse-plaintiff's allegation "that the Board's disclosure of a pending investigation casts an injurious cloud on her fitness as a nurse, making her less employable," as the plaintiff "is

not a terminated public employee, nor has she suffered the arguably analogous injury of license revocation"); cf., Kloch v. Kohl, 2005 WL 3358985 at *4 (D. Neb., December 8, 2005)(denying Motion to Dismiss, where the physician-plaintiff alleged that the licensing board had placed a "letter of concern" in his file, thereby damaging his reputation without an opportunity to clear his name). In their proposed Amended Complaint, we find that the Plaintiffs have not alleged anything more than an injury to their reputations, which is not sufficient to support a procedural due process claim. Therefore, we deny their Motion to Amend in this respect on futility grounds.

In sum, we conclude that the Plaintiffs' proposed amendments are futile, and we deny their Motion to Amend in its entirety.

NOW, THEREFORE, It is ORDERED:

That the Plaintiffs' Motion to Amend the Complaint [Docket No. 73] is DENIED.

BY THE COURT:
Raymond L. Erickson
Dated: December 1, 2008

CHIEF U.S. MAGISTRATE JUDGE

Footnotes

[1]The remaining Defendants have advised that they do not oppose the Plaintiffs' Motion. See, Drees and Omdahl's Response, Docket No. 83; Kamrowski and RoughRider's Response, Docket No. 82. Accordingly, at

the Hearing, no appearance was made by, or on behalf of, the remaining Defendants.

[2]Here, the Complaint apparently refers to a State Court action, which was filed on August 17, 2007, and in which Zutz and Elseth assert claims against Nelson and Stroble for defamation per se, slander, negligent defamation, and seek a Declaratory Judgment, based upon the statements of Nelson and Stroble at the June Board meeting. See, First Affidavit of Kirsten J. Hansen ("First Hansen Aff."), Docket No. 33, Exhibit A ("State Court Complaint"). The disposition of the State Court action is addressed more fully in the text of this Opinion.

[3]Assertedly, the Plaintiffs' non-economic damages include harm to their reputations, mental distress and embarrassment, public scrutiny, and the risk of losing their appointed positions. See, Complaint, supra at Pars. 33, 82.

[4]In contrast, Kamrowski and RoughRider seek Summary Judgment, based upon their contention that they did not publish any allegedly defamatory materials, and that they are entitled to absolute prosecutorial immunity for their investigation. See, Kamrowski and RoughRider's Memorandum in Support, Docket No. 41, at 2.

[5]In their response to the District Defendants' Motions, the Plaintiffs also maintained that their Complaint states a First Amendment claim for retaliation, a Procedural Due Process claim under the Fourteenth Amendment, and a conspiracy claim, pursuant to Title 42 U.S.C. § 1983. See, Plaintiffs' Memorandum in Opposition, Docket No. 50, at 9, 15, 16, 18. However, the Plaintiffs admit that did not sufficiently plead a claim pursuant to the Eighth Amendment. Id.

[6]Counts III through VII of the proposed Amended

Complaint are identical to the Plaintiffs' original claims for defamation, for a Declaratory Judgment, and for a violation of the Fourteenth Amendment. See, Proposed Amended Complaint, supra at Pars. 90-109.

[7]All of the Plaintiffs' factual allegations, in their State Court Complaint, are repeated in their original Federal Complaint, with only minor changes. However, the original Federal Complaint contains a number of additional allegations, given that the Plaintiffs' now assert claims against Drees, Omdahl, Kamrowski, and RoughRider.

[8]On October 10, 2008, the Plaintiffs filed an appeal of the State Court's decision with the Minnesota Court of Appeals, where it remains pending. See, Zutz v. Nelson, Case No. A08-1764, available online at http://macsnc.courts.state.mn.us.

[9]At the Hearing, the Plaintiffs argued that their remaining allegations are not barred by res judicata because the events in question, such as Kamrowski's report, and Drees and Omdahl's letters, occurred after August 17, 2007 – i.e., after the filing of their State Court Complaint -- and therefore, those allegations could not have been asserted in the State Court action. See, Proposed Amended Complaint, supra at Par. 45, 49, 51, 55, 59, 63-65, 74, 77 (allegations dating from November 19, 2007, through April 1, 2008). We consider those claims more fully in subsequent sections of this Order.

[10]The only possible exception is the Plaintiffs' allegation that Kamrowski conducted an investigation. However, at the Hearing, counsel for the Plaintiffs represented that the Plaintiffs did not object to the investigation per se -- rather, they contend only that Kamrowski's report contained defamatory statements. Moreover, in their proposed Amended Complaint, the Plaintiffs admit that

Kamrowski's investigation was authorized the Marshall County Board -- not by the District or its Board -- at the request of the Marshall County Attorney. See, Proposed Amended Complaint, supra at Pars. 41, 44, 53. Accordingly, the Plaintiffs do not allege that Kamrowski engaged in retaliatory conduct when he commenced his investigation.

[11]Interestingly, at the Hearing, counsel for the Plaintiffs described the Marshall County Attorney as a "hero," and further represented that the Plaintiffs have no complaints concerning the Marshall County Attorney's conduct.

[12]In addition, our review of the proposed Amended Complaint does not disclose any basis to conclude that the Plaintiffs intend to assert a deprivation of a property interest that relates to their positions as District Board members, although they claim that they have been barred from participating on subcommittees, in retaliation for exercising their constitutional rights. Again, the proposed Count II, under the Fifth and Fourteenth Amendments, focuses only upon the alleged harm to the Plaintiffs' reputations.

Filed 5/27/10
No. 09-1462
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Loren J. Zutz; Elden J. Elseth,
Appellants,
v.
John Nelson; Arlyn Stroble; Nick Drees; Douglas Kamrowski; RoughRider Legal Support Services, Inc.; Danny Omdahl,
Appellees.

Appeal from U.S. District Court for the District of Minnesota - Minneapolis
(0:08-cv-00958-JNE)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans